

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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POLYTECHNIC INSTITUTE OF NEW YORK UNIVERSITY,	:	
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Employer,	:	
	:	
-and-	:	Case No. 29-RC-12054
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INTERNATIONAL UNION, AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW (UAW),	:	
	:	
Petitioner	:	
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POLYTECHNIC INSTITUTE OF NEW YORK UNIVERSITY'S
CONDITIONAL REQUEST FOR REVIEW

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Polytechnic Institute of New York University (“Polytechnic” or the “Institute”), pursuant to Section 102.67 of the Rules and Regulations of the National Labor Relations Board, submits this Conditional Request for Review of the Decision and Order Dismissing Petition (“Decision”) issued by the Regional Director, Region 29, on August 30, 2011. Polytechnic does not request review of the Decision insofar as it dismisses the petition filed by the International Union, Automobile, Aerospace and Agricultural Implement Workers of America, UAW (UAW)¹ (“UAW” or “Petitioner”) in accordance with *Brown University*, 342 NLRB 483 (2004) (“*Brown*”). However, in the event that the Board grants review of the Decision in order to reconsider *Brown*, Polytechnic requests that the Board also review and reverse the Decision insofar as it failed to dismiss the petition on the additional basis that Polytechnic’s Teaching Assistants (“TAs”) and Graduate Assistants (“GAs”) are temporary employees.

There are compelling reasons for the Board to review and reverse the Regional Directors holding that, in the event *Brown* is reconsidered, the TAs and GAs may comprise a bargaining unit. Substantial questions of law and policy are raised because of the Regional Director’s departure from officially reported Board precedent. NLRB Rules and Regulations, Section 102.67 (1).

¹ The Petition was filed in the name of International Union, UAW. The Regional Director, however, correctly found that its full and correct name is International Union, Automobile, Aerospace and Agricultural Implement Workers of America (UAW). (Decision at 1, n. 1)

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

1. The Prior Proceedings

On May 5, 2011, Petitioner filed a Petition with the Regional Director seeking to represent graduate students at Polytechnic who serve as “Research Assistants, Teaching Assistants and Graduate Assistants . . . at its New York City metropolitan area facilities.” (BX 1)² By letter dated May 12, 2011, Polytechnic requested that the petition be administratively dismissed in accordance with *Brown University*, 342 NLRB 483 (2004) (“*Brown*”), in which the Board explicitly excluded graduate students in such positions from the definition of an employee under the National Labor Relations Act (the “Act”). The Regional Director, however, decided to create a record in this matter and a hearing commenced on May 24, 2011. The hearing concluded on June 7, 2011, after five days of testimony.

2. Factual Background

The facts relevant to this Conditional Request for Review are mostly uncontroverted.

A. *Overview of Polytechnic*

Polytechnic is the second oldest private engineering school in the country and has been in existence for over 150 years. (Decision at 3) Its main campus is in Brooklyn, New York. (Decision at 4) Polytechnic currently has a total of approximately 4,000 students, including about 1,700 undergraduates and 2,300 graduate students. (Decision at 3) Of

² Employer Exhibits are referred to herein as “EX”, Petitioner Exhibits as “PX” and Board Exhibits as “BX”. Transcript references are indicated as “Tr.” followed by the page number and the witness’s name where not evident from the text.

Polytechnic's 2,300 graduate students, approximately 200 are full time PhD students. The balance is enrolled in Master's programs in "a variety of engineering, science management, and technically related areas" as reflected in the catalog. (*Id.*)

The Institute employs approximately 155 full-time faculty members, including some 100 tenured and tenure track faculty. (Decision at 3; Tr. 329 (Becker); Tr. 605 (Ives)) In addition, Polytechnic employs approximately 400 staff,³ including clerical, maintenance and other non-teaching employees, most of whom are full-time. (Tr. 605-06 (Ives); Decision at 3)

Polytechnic is divided into 11 academic departments –Chemical and Biological Engineering; Chemical and Biological Sciences; Civil Engineering; Computer Science and Engineering; Electrical and Computer Engineering; Finance and Risk Management; Humanities and Social Sciences; Mathematics; Mechanical and Aerospace Engineering; Physics; and Technology Management. (Decision at 3)

B. *PhD Degree Programs at Polytechnic*

i. Overview of the PhD Degree Program

All 11 departments except Finance and Risk Management and Humanities and Social Sciences offer PhD degrees. (Tr. 332 (Becker); EX 8 at 17) The PhD degree is a research degree that culminates in the submission and defense of an original research thesis. (*See* Tr. 337 (Becker))

A student must complete a total 75 credits to obtain a PhD degree through a combination of coursework and research, including a minimum of 21 research credits. (Tr. 336-39 (Becker); Tr. 426-27 (Zurawsky); EX. 8 at 30) Once students have completed the first

³ During the hearing, the parties agreed to refer to all non-faculty full-time employees of Polytechnic as "staff" to avoid any confusion with the students who the Petitioner claims to be "employees" under the Act. (*See* Tr. 606)

30 credits, which consist primarily of coursework in the selected field of study, they must pass a PhD qualifying exam in order to be considered a PhD candidate. (Decision at 10; Tr. 337, 342 (Becker); Tr. 471 (Garetz);) Generally, the qualifying exam is taken at the end of a student's the first year of study. (Decision at 10.) It is a discipline-specific exam that "tests the broad knowledge of the student in his or her field of study." (Tr. 342 (Becker)) After a student passes the qualifying exam, he or she spends the majority of the duration of the PhD program performing research that culminates in a thesis. (Decision at 10; Tr. 187 (Bonilla); Tr. 337, 339, 343 (Becker); Tr. 428 (Zurawsky); Tr. 477 (Garetz)).

ii. Financial Support for PhD Students

Polytechnic provides support to its PhD students through two primary mechanisms -- externally funded research assistantships and teaching assistantships. (Tr. 341 (Becker)) As a matter of practice, students generally are supported as TAs in their first year, and are supported as Research Assistants ("RAs") once they pass their PhD qualifying exams and begin their thesis research. (Decision at 10; Tr. 354, (Becker); Tr. 429, 441 (Zurawsky) Tr. 470 (Garetz))

Polytechnic generally admits only the number of PhD students that it can support financially. (Decision at 10) Each year, the Institute supports approximately 25 students with teaching assistantships and between 130 and 150 students with research assistantships. (Decision at 8, 11) In addition, some foreign students receive governmental support from their home country and a limited number of students have either NSF or private fellowships. (Decision at 10) There may also be a small number of unfunded students, although Polytechnic discourages unfunded students from entering its PhD programs. (Decision at 10)

(a) Research Assistantships

To hold a position as an RA, an individual must be registered as a full-time PhD student at Polytechnic. (EX 8 at p.48; *see also* EX 9) RAs work with a faculty member on original research for the RA's dissertation that is a portion of a broader research project sponsored by the faculty member. (Decision at 11) Research assistantships at Polytechnic are funded almost exclusively through external research grants or contracts, with some 75-80 per cent from federal agencies -- both in terms of the number of individuals working on those grants and the dollar value of those grants. (Decision at 12)

(b) Teaching Assistantships

TAs typically are assigned to work in undergraduate teaching labs, and may also perform some grading. (Decision at 9) TAs supervise various groups of students in conducting experiments. They verify that all equipment is in good working order, make sure the students are properly prepared to perform and learn from experiments and advise the students through the course of the lab. (Decision at 9) An individual must be a graduate student in order to retain the assistantship. (Decision at 8-9) Teaching assistantships generally last for just one year. (Decision at 10)

C. *Master's Degree Programs at Polytechnic*

i. Overview of Master's Degree Programs

The Master's degree programs at Polytechnic are designed for students who are seeking to specialize in a particular field before entering an industry or government position. (Tr. 424 (Zurawsky)) A Master's degree typically requires two years of coursework, representing 30 credits, and may also include the option to complete a Master's thesis. (Tr. 423 (Zurawsky); *see also* Tr. 278 (Bonilla); Tr. 464 (Garetz))

ii. Financial Support for Students in Master's Programs –
The GSET Program

Polytechnic primarily supports its Master's students with financial aid provided through appointments as GAs under the Graduate Student Employment and Training ("GSET") Program. (Tr. 177-8 (Bonilla); Tr. 488 (Garetz); Tr. 629 (Ives)) The GSET Program, which was launched in 2010, is housed in the Institute's Graduate Center and oversees and administers all the GA positions at the Institute. (Decision at 5; Tr. 177, 260-61, 245-46 (Bonilla); Tr. 488 (Garetz); Tr. 620, 629 (Ives))

The goal of the GSET Program is to serve the academic and career needs of its students by providing them with a real-life experience within the academic setting that prepares them for their future careers. (Decision at 5; Tr. 177, 200, 248, 255 (Bonilla)) To this end, the GSET Program seeks out projects and duties that students can perform within the Institute's academic and administrative departments that enrich their course of study and then offers them positions as GAs performing these activities. (Decision at 14; Tr. 178 (Bonilla))

Only full-time Master's students at Polytechnic are eligible to be appointed as GAs. (Decision at 7; Tr. 258, 279 (Bonilla)) Students are appointed to GA positions for a single semester. (Decision at 8; Tr. 682 (Ives)) They may be appointed to a GA position for additional semesters provided that they maintain a cumulative grade point average of at least 3.0. (Tr. 209, 258-59 (Bonilla); Tr. 620 (Ives); PX 14; Decision at 7) The overwhelming majority of students hold GA appointments for just one or two semesters. (Decision at 8) Indeed, a study of Masters' students enrolled in 2008 and 2009 shows that 36 percent held a GA position for only one semester and an additional 38 percent held a GA position for a

second semester. (Decision at 8, n. 12; EX 25) Thus, nearly 75% of all GAs during that time held a GA position for two semesters or less.

3. The Regional Director's Decision

On August 30, 2011, the Regional Director issued a decision dismissing the Petition in accordance with the holding in *Brown*. He went on to find that should the Board decide to overrule *Brown*, the RAs at Polytechnic still would not be employees because the research work they perform is funded “not by the university itself, but by outside sources, particularly the federal government,” it is required for their degree, and they receive academic credit for it. (Decision at 16) He found, however, that the TAs and GAs would be employees under the Act despite the fact that students in both positions typically hold these positions for a year or less because “they have a reasonable expectation of employment from one semester to the next.” (Decision at 17) In so holding the Regional Director committed legal error by departing from officially reported Board precedent holding that students employed by the schools in which they are enrolled in similar circumstances are temporary employees who should be excluded from any bargaining unit.

ARGUMENT

THE DECISION INCORRECTLY FOUND THAT, SHOULD *BROWN* BE REVERSED, TEACHING ASSISTANTS AND GRADUATE ASSISTANTS AT POLYTECHNIC SHOULD BE INCLUDED IN A BARGAINING UNIT

The Regional Director departed from Board precedent by concluding that, in the event that *Brown* is reversed, TAs and GAs can form an appropriate bargaining unit.

The TAs and GAs have no real continuing interest in the terms and conditions of the assistantships and are not eligible to participate in an election under the Act. *See Trump Taj Mahal Casino*, 306 NLRB 294, 296 (2002). Both groups of students are employed for a

limited duration and neither has any reasonable expectation of remaining in their position for more than a year. As the Regional Director found, teaching assistantships generally last for just one year and graduate assistants are appointed on a semester by semester basis with the overwhelming majority of students holding graduate assistantships for two semesters or less. (Decision at 8, 10) The fact that a minority of students may receive an appointment as a TA for an additional year and appointments as a GA for an additional semester or two does not provide a reasonable expectation of continued employment beyond the one year of employment that is typical for the vast majority of students.⁴

The Board first held that such student employment is insufficient to confer collective bargaining rights in *Saga Food Service*. In that case, the Board found that student and non-student food service employees did not share a community of interest sufficient to warrant their inclusion in the same bargaining unit. *Saga Food Service*, 212 NLRB 786, 787 (1974). However, the petitioner there also sought, in the alternative, a unit consisting solely of student food service workers. The Board denied that unit as well, stating:

[i]n view of the nature of [the students'] employment tenure and our conclusion that their primary concern is their studies rather than their part-time employment, we find that it would not effectuate the policies of the Act to direct an election among them as a separate unit for purposes of collective bargaining.

Id. at 787, n.9. Thus, the Board excluded the student workers from comprising a bargaining unit. *Id.*

⁴ A student may occasionally serve as a TA for a second year if there is no funding available to support them as a RA, and certain GAs may receive appointments for up to an additional year. The decision notes a single instance where this occurred for a TA. (Decision at 8, n. 17) It also states that 17% of GAs receive an appointment for a third semester and 8% of GAs receive an appointment for a fourth semester. (Decision at 8, n. 12)

In *San Francisco Art Institute*, the Board again considered this issue when determining whether to include student janitors in a unit with non-student janitors. The Board first found no community of interest between full-time non-student janitors and student janitors who worked on a semester by semester basis. See *San Francisco Art Institute*, 226 NLRB 1251, 1251 (1976). In doing so, the Board specifically noted that students work on a semester-by-semester basis, there is high turnover among students and no student had ever continued as a full-time janitor after graduation. *Id.* When asked to consider certifying a student-only bargaining unit, the Board concluded that it would “not effectuate the policies of the Act to direct an election” among students only. *Id.* at 1252. The Board cited “the brief nature of the students’ employment tenure, the nature of compensation for some of the students, and by the fact that students are concerned primarily with their studies rather than with their part-time employment.” *Id.* The Board continued to conclude that “owing to the rapid turnover that regularly and naturally occurs among student janitors, it is quite possible that by the time an election were conducted and the results certified the composition of the unit would have changed substantially.” *Id.*

In both *Saga Food Service* and *San Francisco Art Institute*, the Board held that the fact that the duration of the students’ employment was limited made it inappropriate to certify such a bargaining unit. In *University of West Los Angeles*, 321 NLRB 61 (1996), the Board distinguished these earlier cases in finding that students working as clerks in the university law library were properly included in a non-student bargaining unit where the positions were not related to their enrollment as students and they did not have a date certain end to their position, evidenced by the fact that the students often continued in the same positions after their graduation. The facts regarding TAs and GAs at Polytechnic are

consistent with the *Saga Food Service* and *San Francisco Art Institute* precedent, and distinguishable from *University of West Los Angeles*, as the positions are directly related to the students enrollment at Polytechnic and for a limited duration, which in no event can continue beyond graduation.

The Regional Director inexplicably disregards the Board's clear holdings in both *Saga Food Service* and *San Francisco Art Institute* that it would not effectuate the purposes of the Act to direct an election among a unit of student workers stating that "I find this statement was not intended to be considered as determinative of the efficacy of such a unit or the 2(3) status of the individuals involved." (Decision at 17) To the contrary, the Board's refusal to certify a separate unit of students in both cases was a direct holding that a bargaining unit of students in positions of limited duration at the school in which they are enrolled is inappropriate under the Act. As stated in both decisions the students cannot comprise a bargaining unit because "of the nature of their employment tenure and our conclusion that their primary concern is their studies rather than their part-time employment." *Saga Food Service*, 212 NLRB at 787 n. 9, *see also San Francisco Art Institute* 226 NLRB at 1251.

In holding that the TAs and RAs are not temporary employees, the Regional Director's relies on the Board's holding in *Kansas City Repertory*, 356 NLRB No. 28 (Nov. 16, 2010), that "musicians who worked intermittently, sometimes for just a matter of weeks in one year, are entitled to collective bargaining rights." (Decision at 18) The Board's decision in *Kansas City Music Repertory*, however, was premised on the unique conditions in the entertainment industry and utilized the specific eligibility formula for that industry articulated in *Julliard School*, 208 NLRB 153 (1974), in determining that the musicians had a

sufficient continuing interest in the terms and conditions of their employment. As the Board explained, the musicians were hired whenever a musical show was performed and individuals were eligible to be hired for future shows indefinitely. *See Kansas City Repertory*, 356 NLRB at *4-5. Contrary to the Regional Director's position, *Kansas City Repertory* does not support a finding that TAs and GAs, who have no expectation of continuing or repeated employment in the future, should be accorded collective bargaining rights.

Saga Food Services and *San Francisco Art Institute* govern the eligibility of students employed by the schools in which they are enrolled and whose positions are of a limited duration. These cases are guided by the specific facts relevant to the students in positions at educational institutions where, unlike in the entertainment industry, the students' positions are limited in duration.

CONCLUSION

In the event that the Board grants review of the Regional Director's decision in order to reconsider the holding in *Brown* that graduate assistants are not employees under the Act, Polytechnic requests that the Board also review and reverse the Decision insofar as it failed to dismiss the petition on the additional basis that TAs and GAs are temporary employees.

New York, New York
September 13, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that copies of the within Conditional Request For Review in Case No. 29-RC-12054 has been served by electronic mail on this date on:

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